Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-1071

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CENTRAL STATE UNIVERSITY,
Petitioner,
v.
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
CENTRAL STATE UNIVERSITY CHAPTER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY CHAPTER

DONALD J. MOONEY, JR.
Counsel of Record
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
2800 Cincinnati Commerce Center
Cincinnati, Ohio 45202
(513) 762-6271

MARK D. TUCKER
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
88 East Broad Street, 9th Floor
Columbus, Ohio 43215
(614) 223-9358

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1698

QUESTION PRESENTED

Whether the Ohio Supreme Court correctly applied the "rational basis test" in determining that R.C. 3345.45 is invalid under the Equal Protection Clauses of the Ohio and United States Constitutions?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. INTRODUCTION	6
II. THE OHIO SUPREME COURT'S DECISION IS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT	7
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ., No. 95CV238 (Greene C.P. Feb. 6, 1996)	4
American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ., No. 96-CA-21 (Greene App. Jan. 31, 1997)	4
American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ., 83 Ohio St.3d 229, 699 N.E.2d 463 (1998)	4, 6, 7, 8, 9
Nordlinger v. Hahn, 505 U.S. 1 (1992)	8
Constitutions	
U.S. Const., Amend. XIV, § 1	3
Ohio Const., Art. I, § 2	2, 3
Statutes	
R.C. 3345.45	*passim*
R.C. 4117.01(C)	3
R.C. 4117.08(A)	2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-1071

CENTRAL STATE UNIVERSITY,
Petitioner,
v.
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
CENTRAL STATE UNIVERSITY CHAPTER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY CHAPTER

Respondent American Association of University Professors, Central State University Chapter, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ohio Supreme Court's decision in this case. The Ohio Supreme Court's opinion is reported at 83 Ohio St.3d 229, 699 N.E.2d 463 (1998), and is reproduced in the appendix to the Petition at A-1.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Petitioner sets forth the relevant portion of the Fourteenth Amendment to the United States Constitution and the Ohio statutes at issue herein. The Petitioner fails,

however, to set forth the text of Article I, § 2, of the Ohio Constitution, which is also directly at issue in this case. That section provides, in full:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

STATEMENT OF THE CASE

Respondent American Association of University Professors, Central State University Chapter ("AAUP"), is certified by the Ohio State Employment Relations Board ("SERB") as the exclusive collective bargaining agent for full-time faculty members at Petitioner Central State University ("CSU" or "University"). In that capacity, AAUP has negotiated a series of collective bargaining agreements with the University since approximately 1985. Consistent with R.C. 4117.08(A), which authorizes public employee collective bargaining in Ohio, the agreements between AAUP and the University have traditionally set terms for faculty workload, hours, compensation, fringe benefits, and other working conditions.

Effective July 1, 1993, the Ohio General Assembly enacted R.C. 3345.45, which provides, in pertinent part:

> On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding Section 4117.08 of the Revised Code, *the policies adopted under this section are not appropriate subjects for collective bargaining*. Notwithstanding Division (A) of Section 4117.10 of the Revised Code, any policy adopted under this section by the board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees.

R.C. 3345.45 (emphasis added). Under this section, the faculties of state universities are not permitted to collectively bargain over their workload. No other group of Ohio "public employees," as that term is defined in R.C. 4117.01(C), is denied the right to collectively bargain over their workload.

On January 7, 1994, as required by R.C. 3345.45, the Ohio Board of Regents ("OBR") issued "standards" for instructional workloads for full-time and part-time faculty. On June 16, 1994, the Board of Trustees of CSU unilaterally adopted a new workload policy, which required an increase in normal full-time teaching from the twelve (12) credit hours per quarter agreed upon in the AAUP collective bargaining agreement, to fifteen (15) credit hours per quarter. The new policy also increased faculty office hours from the previously negotiated eight (8) hours per week to ten (10) hours per week. The new workload policy was unilaterally implemented by the University in September, 1994.[1] Asserting that R.C. 3345.45 prohibited collective bargaining on faculty workload issues, CSU refused to bargain with the AAUP concerning its new workload policy.

Accordingly, on May 17, 1995, the AAUP filed its complaint for declaratory and injunctive relief in the Court of Common Pleas for Greene County, Ohio asserting that R.C. 3345.45 violated the Equal Protection Clauses of the Ohio and United States Constitutions. U.S. Const., Amend. XIV, § 1; Ohio Const., Art. I, § 2. On February 6, 1996, the trial court issued its Decision and Final Order disposing of all of AAUP's claims and overruling

---

[1] Not all Ohio state universities responded to R.C. 3345.45's mandate and the "standards" issued by the OBR in the same way. For example, the Ohio State University, the University of Cincinnati, and Wright State University adopted workload policies which do not set minimum contact or credit hours for faculty.

the requests for declaratory and injunctive relief. *American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ.*, No. 95CV238, App. at A-64 (Greene C.P. Feb. 6, 1996). On January 31, 1997, the Court of Appeals for Greene County, Second Appellate District, issued its Opinion and Final Entry, reversing the decision of the trial court and remanding the case to that court for further proceedings. *American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ.*, No. 96-CA-21, App. at A-23 (Greene App. Jan. 31, 1997).

CSU timely appealed, and AAUP timely cross-appealed, from the Court of Appeals' decision. On September 30, 1998, the Ohio Supreme Court ruled that R.C. 3345.45 violated the Equal Protection Clauses of the Ohio and United States Constitutions. *American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ.*, 83 Ohio St.3d at 229, 699 N.E.2d at 463 (1998). In so ruling, the Ohio Supreme Court applied a long line of equal protection precedent. Because Petiitoner incorrectly contends that the lower court "ignored" the prior decisions of this Court, the Ohio Supreme Court's discussion is set forth herein at length:

> The determinative issue in this case is, therefore, whether R.C. 3345.45 bears a rational relation to a legitimate governmental interest. In considering this issue, we are guided by the principles that all legislative enactments enjoy a strong presumption of constitutionality and that, under rational-basis scrutiny, a legislative distinction will be upheld if there exists any conceivable set of facts to justify it.
>
> * * * The record suggests, and the parties agree, that the object of this legislation is not to increase total faculty workload, but to effect a change in the ratio between faculty activities in order to correct the imbalance between research and teaching at four-year undergraduate state institutions created by a faculty reward system which prizes research over

> teaching. Intrinsically, this is a concern over the quality of undergraduate education and, therefore, is a legitimate governmental interest.
>
> The fact that the General Assembly chose to correct only the decline in teaching-related activity at this time, rather than attempt to address all at once the various factors that the record suggests have contributed to the instability of higher education in Ohio, does not diminish the legitimacy of its interest. "It is generally recognized that when a legislative body chooses to act to correct a given evil it need not correct all the evil at once, but it may proceed step-by-step."
>
> However, the existence of a legitimate governmental interest will not enable the legislative classification to pass constitutional muster if the party attacking the legislation can show that there is no rational basis for the differential treatment. Many of the arguments advanced by CSU and its supporting *amicus curiae*, Ohio Board of Regents, seek to establish a general relationship between faculty workload and quality of education, or to justify treating differently the faculty at two- and four-year institutions. Such arguments, however, miss the mark, as they fail to address the essential question of whether there exists a rational basis for placing faculty members in a class by themselves *as the only public employees as defined in R.C. 4117.01(C) denied the right to collectively bargain over their workload.*
>
> * * * *
>
> We have reviewed each of these reports [relied upon by CSU], and all other evidence contained in the record, and can conclude with confidence that there is not a shred of evidence in the entire record which links collective bargaining with the decine in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching. Indeed, these reports appear to indicate that factors other than collective bar-

> gaining are responsibe for the decline in teaching activity.
>
> In light of the foregoing, we cannot find any rational basis for singling out university faculty members as the only public employees as defined in R.C. 4117.01(C) precluded from bargaining over their workload. Accordingly, we hold that R.C. 3345.45 violates the Equal Protection Clauses of the Ohio and United States Constitutions, since the classification contained therein bears no rational relationship to a legitimate governmental interest.

Id., 83 Ohio St.3d at 234-36, 699 N.E.2d at 468-69, App. at A-9 to A-15 (citations omitted) (emphasis in original). CSU has timely petitioned this Court for a writ of certiorari to the Ohio Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION

As demonstrated by the above quotation from the Ohio Supreme Court's decision, that court carefully set forth the proper equal protection analysis to be applied in this case. In its petition, CSU has failed to establish *any* error in the Ohio Supreme Court's analysis, let alone an error so egregious as to warrant the requested summary reversal.

Contrary to the assertions made in CSU's petition, the Ohio Supreme Court did not depart from this Court's decisions in ruling that R.C. 3345.45 violated the Equal Protection Clauses of the Ohio and United States Constitutions. Rather, the lower court applied the well-established equal protection test for governmental classifications involving neither a suspect class nor a fundamental right—whether the classification is rationally related to a legitimate governmental interest.

The AAUP did not contest, and the Ohio Supreme Court accepted, the state's asserted legitimate government interest, *i.e.*, "to effect a change in the ratio between faculty activities in order to correct the imbalance between

research and teaching at four-year undergraduate state institutions created by a faculty reward system which prizes research over teaching." *Id.*, 83 Ohio St.3d at 234-35, 699 N.E.2d at 468, App. at A-10. The AAUP did, however, prove, and the Ohio Supreme Court found, that R.C. 3345.45 was not rationally related to the achievement of that goal.

In reaching that conclusion, the Ohio Supreme Court reviewed all the evidence submitted by both parties. The Court found no evidence relating R.C. 3345.45, rationally or otherwise, to the achievement of the state's goal. It is upon that basis, and that basis only, that the court ruled R.C. 3345.45 invalid. The court did not ignore this Court's equal protection pronouncements or shift the burden of proof. It simply ruled that the AAUP had satisfied its burden of proof.

Because the Ohio Supreme Court applied the appropriate analysis to the AAUP's equal protection claims, consideration of this case by this Court is not warranted. Even were this Court to grant the petition for certiorari, and to rule that the Ohio Supreme Court incorrectly resolved the AAUP's equal protection claims, its decision will add nothing to the great body of equal protection case law.[2] Accordingly, this case does not warrant this Court's review, and the petition for a writ of certiorari to the Ohio Supreme Court should be denied.

II. THE OHIO SUPREME COURT'S DECISION IS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

To support its request for the extraordinary relief of summary reversal, CSU asserts that the Ohio Supreme Court "ignored" the decisions of this Court by improperly shifting the burden of proof to the state and by misapplying the rational basis test. Petition at 9, 11. A fair read-

---

[2] Petitioner implicitly concedes this fact by asking this Court to summarily reverse the Ohio Supreme Court's decision rather than to grant full review in this case.

ing of the Ohio Supreme Court's decision below, however, does not support CSU's assertions. Accordingly, this Court should deny review of the Ohio Supreme Court's decision.

As this Court has noted:

> The appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (citations omitted).

CSU first argues that the Ohio Supreme Court ignored the decisions of this Court by "improperly plac[ing] the burden on the *State* to prove the relationship between the statute and the State's legitimate reason for enacting it. Petition at 9 (emphasis in original). In making this assertion, CSU directs this Court's attention to that portion of the Ohio Supreme Court's decision where it stated that CSU's and the state Board of Regent's "*arguments* . . . miss the mark." Petition at 11 (quoting *American Ass'n of Univ. Professors, Central State Univ. Chapter*, 83 Ohio St.3d at 235, 699 N.E.2d at 469, App. at A-11) (emphasis added). CSU's assertion, however, is simply not supported by a fair reading of the decision below.

As indicated in the above quotation from the Ohio Supreme Court's decision, that court accorded the General Assembly's enactment the appropriate presumption of constitutionality, see *American Ass'n of Univ. Professors, Central State Univ. Chapter*, 83 Ohio St.3d at 234, 699 N.E.2d at 468, App. at A-10 ("In considering this

issue, we are guided by the principles that all legislative enactments enjoy a strong presumption of constitutionality and that, under rational-basis scrutiny, a legislative distinction will be uphed if there exists any conceivable set of facts to justify it.") (citations omitted), and in so doing, it placed the burden of proof squarely on AAUP:

> However, the existence of a legitimate governmental interest will not enable the legislative classification to pass constitutional muster *if the party attacking the legislation can show* that there is no rational basis for the differential treatment.

American Ass'n of Univ. Professors, Central State Univ. Chapter, 83 Ohio St.3d at 235, 699 N.E.2d at 469, App. at A-11 (emphasis added).

The Court below, after reviewing all of the evidence submitted, and after considering the parties' *arguments*, concluded that the AAUP had satisfied *its* burden of proof by establishing that R.C. 3345.45 was not rationally related to the state's legitimate interest of improving the quality of undergraduate education. The Ohio Supreme Court simply rejected CSU's *arguments* to the contrary. It did not require, or even purport to require, the state, through CSU, to come forward with evidence supporting the legislative enactment. It is disingenuous, therefore, for CSU to assert that the Ohio Supreme Court placed the burden of proof on the state.

Indeed, the evidence submitted by AAUP established that no relationship, rational or otherwise, existed between R.C. 3345.45's collective bargaining ban and its goal of improving undergraduate instruction. In response to AAUP's proof, CSU *argued* that the legislative enactment was rationally related to two narrow goals: "recapturing" a perceived decline in the amount of time devoted by faculty members to undergraduate instruction and achieving statewide "uniformity" in faculty workload. It is these arguments that the Ohio Supreme Court found unpersuasive. The rejection of a state's *arguments*

supporting a legislative enactment is not tantamount to placing the burden of proof on the state.

Furthermore, the record demonstrates that the Ohio Supreme Court properly rejected CSU's and the OBR's arguments. None of the evidence submitted to the courts below in this case suggests that the decline in the amount of faculty time devoted to undergraduate teaching was the result of collective bargaining. Indeed, the evidence established that faculty workload at state universities that collectively bargained with their faculty was actually *higher* than at those universities without collective bargaining. The OBR's records revealed that teaching workload was higher at those state universities where faculty collective bargaining occurred. The 1990 "Basic Data Series" collected and compiled by OBR established that the "average credit hours assigned," "average contact hours assigned," and "average student credit hours taught" were all higher at the state's "union" campuses than at the state's "non-union" campuses. Based upon this evidence, Defendant's witness Dr. Howard L. Gauthier, Executive Associate to the Chancellor of OBR, conceded that credit hours assigned to faculty at the "collective bargaining campuses" in 1990, the last measured date offered, were actually *above* the statewide average.

The other evidence submitted to the trial court, and relied upon by both CSU and OBR in the court below, included the Report of the "Managing for the Future Task Force" ("Task Force Report"), OBR's report entitled "Securing the Future of Higher Education in Ohio" ("Regent's Report"), the "Report of the Regents' Advisory Committee on Faculty Workload Standards and Guidelines" ("Standards and Guidelines Report"), the "Report of the Regents' Advisory Committee on Faculty Workload, the Reward and Evaluation of Teaching" ("Evaluation and Reward of Teaching Report"), and the Legislative Office of Education Oversight's Report entitled "The Faculty Reward System in Public Universities" ("LOEO Report"). None of these reports, however,

linked the decline in faculty time devoted to undergraduate teaching to faculty collective bargaining.

The Task Force Report included a series of recommendations and established six (6) "priorities." "Priority 3" called for the state to "increase productivity and reduce costs." In support of this "priority," the Task Force endorsed the development of "an institutional faculty workload policy which defines the individual or group performance standard for each academic area . . . ." The Task Force, however, emphasized that no workload policy should be adopted by a state university without assurances that "[*t*]*he rights of employees to bargain collectively are protected.*" (Emphasis added). Nowhere in the Task Report did the Task Force link any perceived reduction in undergraduate teaching to faculty collective bargaining concerning workoad at state universities.

The Regents' Report extensively addressed the issue of "faculty workload and evaluation." While the Regents endorsed the goal of increasing the amount of faculty time devoted to undergraduate instruction by approximately ten percent (10%), the Regents' Report contained no findings linking collective bargaining to any previous reduction in workload. Nor did the Regents' Report recommend that faculty workload be exempted from collective bargaining.

The Standards and Guidelines, Evaluation and Reward of Teaching, and the LOEO Reports were not even issued until after R.C. 3345.45 was enacted. Furthermore, the LOEO Report expressly attributed the decline in undergraduate education to a combination of three factors:

1. A national competition for prestige, funds, faculty and students;
2. The perceived difficulty of assessing faculty work other than research; and
3. The nationwide culture of universities.

Conspicuously absent from all of these Reports is any suggestion that collective bargaining at state universities in any way contributed to a reduction in the amount of time faculty devoted to undergraduate teaching. Consequently, the record is completely devoid of any evidence supporting CSU's and OBR's contention that the elimination of collective bargaining on workload was necessary to recapture the documented 10% decline in teaching.

Nor does R.C. 3345.45 bear any relationship to OBR's asserted purposes of achieving uniformity across the state's public campuses. First, R.C. 3345.45 neither mandates nor promotes uniformity in workload policies across state university campuses. R.C. 3345.45 does not establish a standard workload or require state universities to adopt workload policies that are in conformity with one another.

Furthermore, OBR's Standards and Guidelines Report, contains no *uniform* standard. Rather, the "standards" adopted by OBR pursuant to R.C. 3345.45 provide for "flexibility," and encourage state universities to adopt workload policies that set forth "suggested ranges in departmental teaching responsibilities."

And second, a review of the workload policies adopted by state universities pursuant to R.C. 3345.45 reveals that no such uniformity exists. The policy adopted by CSU on June 16, 1994, as modified in the fall of 1994, requires full-time teaching of 15 contact hours per quarter and 10 office hours per week. The policies adopted by The Ohio State University, the University of Cincinnati, and Wright State University, on the other hand, set no minimum contact or credit hours for faculty.

As demonstrated above, this case involves nothing more than a disagreement over whether AAUP proved its state and federal equal protection claims in the courts below. The Ohio Supreme Court, carefully following its own precedent, as well as the prior decisions of this Court, ruled that AAUP had indeed satisfied its burden of proof.

This Court should not, therefore, grant review in this case for the sole purpose of reweighing the evidence submitted below. Accordingly, the petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

DONALD J. MOONEY, JR.
Counsel of Record
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
2800 Cincinnati Commerce Center
Cincinnati, Ohio 45202
(513) 762-6271

MARK D. TUCKER
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
88 East Broad Street, 9th Floor
Columbus, Ohio 43215
(614) 223-9358

Dated: January 29, 1999